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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

No. 81

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Petitioner,

vs.

JOHN P. McELROY, et al.,
and
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Respondents.

No. 128

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Petitioner,

vs.

JOHN P. McELROY, et al.,
and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

BRIEF IN OPPOSITION.

CHARLES R. JUDGE,
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 1417.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Petitioner,

vs.

JOHN P. McELROY, et al.,

and

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Respondents.

No. 1466.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Petitioner,

vs.

JOHN P. McELROY, et al.,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

BRIEF IN OPPOSITION.

QUESTION PRESENTED.

Whether the Railway Labor Act, as construed by prior decisions of this Court, permits an engineman employee of a carrier, having seniority both as fireman and engineer, to designate the craft representative of firemen (BLF&E), to which he belongs, as his representative in the handling of his personal grievance or time claim arising while he was working as an engineer, a practice which was uniformly recognized in the railroad industry for fifty years, and which was sustained

by the decision below, or whether the craft representative of engineers (BofLE) and the carrier (Terminal) have the statutory right to nullify this practice by agreement that only the BofLE may represent such engineman in his minor dispute.

STATUTE INVOLVED.

In addition to the statutory provisions raised by petitioners, Section 2 Eleventh (c) of the Railway Labor Act (45 U. S. C., § 152 Eleventh (c)) is also involved and is set forth in Appendix A hereto.

ARGUMENT.

1. The point urged by petitioners, that the craft representative under the Railway Labor Act should be vested with exclusive authority in the handling of grievances, was long ago settled adversely to petitioners' contention in **Elgin Joliet & Eastern R. Co. v. Burley** (1945), 325 U. S. 711. In a comprehensive analysis of the representation provisions of the Railway Labor Act, the Court in Burley concluded, 325 U. S. at 739-741, that the Act did not vest in the craft representative any right of representation in the handling of minor disputes, such as individual grievances and time claims, but rather vested in the individual employee himself the right of control in those matters.[1]

The argument advanced by petitioners that the handling of grievances should be considered a part of the collective bargaining process and as such vested in the craft representative is the identical argument made in Burley and rejected because the statutory scheme was otherwise.

> "Petitioners' contrary view, as has been indicated, regards the settlement of grievances as part of the collective bargaining power, indistinguishable from the making of collective agreements. The assumption ignores the major difference which the Act has drawn between those functions, both in defining them and in the modes provided for settlement." 325 U. S. at 739.

The scope of the ruling in that case, that control over grievance matters was vested in the employee, and not in

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[1] This construction of the Railway Labor Act was recently applied in **Brotherhood of Railroad Trainmen v. Akron & BRR Co.** (D. C. Cir. 1967), 385 F. (2) 581, 603-4, cert. den., litigation which followed the expiration of Arbitration Award 282 under Public Law 88-108.

the craft representative, was not confined to proceedings before the National Railroad Adjustment Board, as B&LE suggests, but applies to the totality of grievance procedures. 325 U. S. at 729 and 739-741. And the rights so vested in employees cannot be destroyed by the collective agreement. 325 U. S. at 744. The **Burley** case stands as an insuperable barrier to petitioners' contention.

Subsequently, in **Pennsylvania R. Co. v. Rychlik,** (1957), 352 U. S. 480, this Court construed the 1951 union shop amendment to the Railway Labor Act, Section 2 Eleventh (45 U. S. C., § 152 Eleventh). In reviewing the legislative history of the amendment, it was pointed out that subsection (c) was added to solve problems of job mobility in train and engine service. While disputes have arisen concerning the application of this subsection in other fact settings, there can be no doubt that Section 2 Eleventh (c) permits the individual respondents, while working as engineers, to satisfy a union security agreement pertaining to engineers by maintaining membership in BLF&E, the craft representative of firemen on Terminal.[2]

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[2] BofLE itself so construed Section 2 Eleventh (c) and for that reason opposed its enactment, being the only railroad labor organization to take that position. **O'Connell v. Erie Lackawanna R. R.** (2d Cir. 1968), 391 F. (2) 156 at 161; 96 Cong. Rec. 16329-16330, 17052. Its continued opposition and efforts to frustrate the legislative intent are manifest in this litigation. Under even the most narrow construction of Section 2 Eleventh (c), being that which was urged and rejected in the **O'Connell** case and in **Birkholz v. Dirks** (7th Cir. 1968), 391 F. (2) 289, the fact that these respondents have interchangeable rights as firemen and engineers, and that BLF&E is craft representative of firemen, is all that is necessary to permit them to maintain membership in BLF&E while working as engineers. Since the right of respondents to maintain membership in BLF&E is not at issue here, but only the benefits flowing from that right, we do not pursue BofLE's allegation that none of the respondents is likely to be called to work as a fireman, except to note (a) to limit the statutory right to only those enginemen who, under local conditions at any given time, may likely be called to work as a fireman, would make the exercise

The Court below held as an independent ground for its decision that the statutory right of membership provided in Section 2 Eleventh (c) was not intended by Congress to be empty and meaningless, but that it carried with it benefits of membership, including the right to call upon the organization for representation in minor disputes. In so holding, the Court below was entirely consistent with the decisions in **Burley** and **Rychlik.**

The effect of the Court of Appeals decision is simply to restore to the individual respondents a right that had been universally recognized in the railroad industry for at least fifty years, that is, the right of an engineman employee to call upon whichever of the engine service organizations he maintained membership in to represent him in his individual grievance or time claim.[3]

There is overwhelming statutory support for the Court of Appeals decision in the language of the applicable provisions of the Railway Labor Act, particularly in the light of the **Burley** decision and the customs and practices in effect when these provisions were adopted. Thus, Section 2 Second requires that all disputes "be considered * * * in conference between representatives designated * * * respectively, by the carrier or carriers and by the employees thereof interested in the dispute"; Section 2

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of that statutory right uncertain and transitory, leading to turmoil and dispute and the inevitable necessity of maintaining dual union memberships or of frequently changing unions, which was exactly what Congress and the participating unions sought to avoid; and (b) since the rule permitting waiver of promotion rights was abrogated in 1950, the so-called "fixtures" filling assignments on the Terminal are being eliminated by attrition.

[3] Walker D. Hines, Director General of Railroads, by order dated Aug. 29, 1919, imposed on all railroads under Federal control this representation rule which had resulted from a 1913 agreement between B. of L. E. and B. L. F. & E. (Appendix B). This was in effect on the Terminal property until the agreement of Nov. 15, 1965 between BofLE and Terminal.

Third forbids "interference, influence, or coercion by either party over the designation of representatives by the other"; Section 2 Sixth requires the designated representatives to confer; Section 2 Eleventh (c) permits the individual respondents to satisfy BofLE's union security agreement by membership in BLF&E; and Section 3 First (i) requires that minor disputes be handled in "the usual manner" at the company level.

The statutory language, the historical customs and practices in the industry, and the **Burley** decision establish beyond doubt that no other result than that reached by the Court below could be justified and review is not called for.

2. Petitioner's complaint that the decision here cannot be reconciled with four prior decisions of the Courts of Appeals is wholly without merit. Two of these cases are earlier decisions of the Seventh Circuit itself, and all of them are distinguishable on facts and issues.

Since the earlier Seventh Circuit decisions would not result in a conflict between circuits even if they were not distinguishable, and since, additionally, the Court below did adequately and properly distinguish them, we consider here only the Eighth Circuit cases, **Brooks v. Chicago, R. I. & P. R. Co.** (1949), 177 F. (2) 385 and **Butler v. Thompson** (1951), 192 F. (2) 831. With respect to these cases the following should be noted:

(a) Neither case presented a fact situation involving craft mobility or the application of Section 2 Eleventh (c), which forms an independent ground sustaining the decision here.

(b) Both cases involved actions for re-instatement. **Butler v. Thompson** turned on jurisdiction, affirming a judgment of dismissal based on the holding in **Slocum v.**

Delaware L & W R. Co., 339 U. S. 239, that exclusive jurisdiction lay in the National Railroad Adjustment Board; **Brooks** was decided on the fact finding that discharge was occasioned by plaintiff's misconduct. The discussions concerning grievance procedure in each case was dictum.

(c) Neither case considered the decision of this Court in **Elgin, Joliet & Eastern R. Co. v. Burley**, 325 U. S. 711, which controls the point raised by petitioners concerning the rights of the craft representative in grievance matters. To the extent either Eighth Circuit case could be construed to be in conflict with the decision here and to support petitioners' position, it would to that extent in turn be in conflict with **Burley.**

(d) Neither case involved the historical practice of representation found in the engine crafts, antedating the adoption of the Railway Labor Act and applicable amendments, and which undoubtedly influence the construction of the representation provisions of the Act insofar as the engine crafts are concerned.

There is no conflict in decision with the cases cited by petitioners.

3. With respect to the petition of Terminal, it is astonishing that that petitioner has totally closed its eyes to the existence of subsection (c) of Section 2 Eleventh, under which these respondents have the statutory right to belong to BLF&E, the constantly referred to "minority union", while working as engineers. Not once does Terminal even mention this legislative enactment, even though it forms an independent ground of decision of the Court below.

Neither does Terminal admit to the fact that the representation practice it complains of, and sought to termi-

nate with its November 15, 1965 agreement with BofLE, has existed throughout the railroad industry for over fifty years. Only one resort to the courts resulted, in which an earlier attempt by BofLE to accomplish much the same results it seeks in this litigation was rebuffed. **General Committee v. Southern Pacific Co.** (9th Cir. 1942), 132 F. (2) 194, rev. on jurisdictional grounds, 320 U. S. 338. Since the decision of this Court in **Brotherhood of Railroad Trainmen v. Chicago River & I. R. Co.** (1957), 353 U. S. 30, eliminated the strike threat in minor disputes, it is obvious that labor peace is not threatened by the continuation of a representation practice that has endured for over half a century.

The decision in **Burley**, criticized by Terminal, nevertheless established the distinction between major and minor disputes and the role of the craft representative in each that has become the accepted norm in the railroad industry.[4] When Terminal entered into the November 15, 1965 agreement with BofLE, it had to recognize that BofLE had no statutory rights to represent engineers in grievance matters. Whatever right BofLE now claims results from that agreement. It is obvious that by entering into that agreement, Terminal sought to interfere, influence, and coerce these respondents in their choice of representatives in their grievances contrary to the express prohibition of section 2 Third of the Act.

We find it incredible that Terminal, not content to abide the result of this litigation with respect to the validity of its contract, has chosen instead to aggressively seek

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[4] **Conley v. Gibson** (1957), 355 U. S. 41, cited by Terminal, involved the refusal by the craft representative to represent Negro members of the craft, as a result of which they were discharged. There is no conflict between the finding in **Conley** of a "duty" to fairly represent the Negro minority, when representation is requested, and the decision in **Burley** that there is no "right" of representation in minor disputes, absent request and authorization.

the upset of long established practices that are supported by the language of the Railway Labor Act and the prior decisions of this Court. Regardless of its motivation, it ignores the fact that a principal purpose for the enactment of the Act was the elimination of carrier interference with its employees in the selection of representatives. **Texas & N. O. R. v. Brotherhood of Ry. & S. S. Clerks** (1930), 281 U. S. 548, 569.

The position of Terminal as petitioner is indefensible.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petitions for writ of certiorari should be denied.

Respectfully submitted,

CHARLES R. JUDGE,
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St. Louis, Missouri 63101,

NORMAN C. NOLD,
201 South State,
Freeburg, Illinois,
Counsel for Respondents John P. McElroy, et al.

APPENDIX A.

Section 2 Eleventh (c) of the Railway Labor Act.

The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership; **Provided, however,** That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: **Provided, further,** That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

APPENDIX B.

United States Railroad Administration,
Walker D. Hines, Director General of Railroads.

Washington, August 29, 1919.

Gentlemen:

After carefully considering the proposal to adopt certain rules from what is known as the Chicago Agreement between the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Fireman and Enginemen, including a consideration of your letters to Mr. Tyler on the subject, I have concluded that the advantages to the railroads from the adoption of such part of this agreement as we are asked to adopt sufficiently outweigh any possible disadvantage as to fully justify the adoption of these rules for all railroads in Federal control, effective as of September 1st, 1919.

Won't you please, therefore, instruct Federal Managers and General Managers that the following rules of the Chicago Joint Agreement are adopted and are to be written into the schedules of the engineers and firemen on all railroads in Federal control where such schedules exist and where they are not already included in such schedules.

Would call your particular attention to the fact that paragraph (*f*) of Article 11, relating to a monthly guarantee for extra engineers and firemen is not included.

Rules from Chicago Joint Agreement between the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, to be incorporated in existing schedules on railroads where such schedules exist and where they are not already included in such schedules.

Representation Rule.

The right of any Engineer, Fireman or Hostler to have the regularly constituted committee of his organization represent him in the handling of his grievances, under the recognized interpretation placed upon the schedule involved by the officials of the Company and the General Committee making the same, is conceded; provided, when a member of either organization has a grievance, which the local committee of his organization is unable to adjust with the local officers of the Company, the matter shall be handled by the two General Chairmen, who shall work jointly in handling such grievance to its final conclusion.

* * * * * * *

Yours very truly,

(Signed) Walker D. Hines,
Director General of Railroads.

Mr. R. H. Aishton, Chicago, Ill.
Mr. B. F. Bush, St. Louis, Mo.
Mr. A. T. Hardin, New York, N. Y.
Mr. Hale Holden, Chicago, Ill.
Mr. N. D. Maher, Roanoke, Va.
Mr. C. H. Markham, Philadelphia, Pa.
Mr. B. L. Winchell, Atlanta, Ga.